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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALVIN T. ADAMS, SR. et al.,

Petitioners,

—v.—

WALTER INDUSTRIES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court issue a writ of certiorari to review the lower court's exercise of its discretion in denying—without opinion—a Petition for Writ of Mandamus seeking a jury trial, when Petitioners' *own pleadings* in this and in other lawsuits showed that the issues to be tried were equitable?

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Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953) 24

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 24, 25

Black v. Boyd, 248 F.2d 156 (6th Cir. 1957) 25

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 10

California v. Rooney, 483 U.S. 307 (1987) 8, 10

Case of the City of London, 1 Ventr. 351, 86 Eng. Rep. 226 (1680) 16

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984) 26

Cimino et al. v. Raymark Industries, et al. 4, 14

Curtis v. Loether, 415 U.S. 189 (1974) 10

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) 9, 24, 25

Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984) 18

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Dr. Salmon v. The Hamborough Company, 1 Ch. Cases 204 (1671) 17-19

Edmunds v. Brown & Tillard, 1 Lev. 237, 83 Eng. Rep. 385 (1668) 16

Eldredge v. Gourley, 505 F.2d 769 (3d Cir. 1974) 25

Ex Parte Simons, 247 U.S. 231 (1918) 24

Filmon Process Corp. v. Sirica, 379 F.2d 449 (D.C. Cir. 1967) 25

First National Bank of Waukesha v. Warren, 796 F.2d 999 (7th Cir. 1986) 9, 24, 25

General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964) 25

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 3, 8, 10-12

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 13

Harvey v. East-India Company, 2 Vernon's Cases in Chancery (1700) 18

In re Don Hamilton Oil Co., 783 F.2d 151 (8th Cir. 1986) 25

In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974), *opinion withdrawn*, 527 F.2d 602 (1st Cir. 1975) 25

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In re Vorpahl, 695 F.2d 318 (8th Cir. 1982) 25

In re Zweibon, 565 F.2d 742 (D.C. Cir. 1977) 25

Kerr v. United States District Court, 426 U.S. 394 (1976) 23

Larned et al. v. Kohlberg, Kravis, Roberts & Co. et al. 4, 5

Maldonado v. Flynn, 671 F.2d 729 (2d Cir. 1982) 25

Mallard v. United States District Court, 490 U.S. 296 (1989) 23, 25

Naylor v. Brown, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673) 19, 20

Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir.1983) 25

Ross v. Bernhard, 396 U.S. 531 (1970) 21

Tull v. United States, 481 U.S. 412 (1987) 10, 21

Vose v. Grant, 15 Mass. Rep. 505 (1819) 19, 21

Will v. United States, 389 U.S. 90 (1967) 16, 23

Wilmington Trust v. United States District Court, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992) 25

Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131 (2d Cir. 1991) 7-11

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Wood v. Drummer, 3 Mason 308, Fed. Cas. No. 17,944 (1824) 19

STATUTES, RULES AND REGULATIONS TREATISES AND OTHER AUTHORITIES

2 J.S. Davis, *Essays in the Earlier History of American Corporations* (1917) 17

8 W. Holdsworth, *A History of English Law* (1937) 16

15A W. Fletcher, T. Bjur & J. Reinholtz, *Fletchers' Cyclopedia of the Law of Private Corporations* (1990) . . . 19

A Letter to a Member of Parliament Touching the Late Intended Bank (1721) 16

A.B. DuBois, *The English Business Company After the Bubble Act, 1720-1800* (1938) 16

Asbestos Victims Seek Corporation Liability, UPI, July 13, 1989, *available in* LEXIS, Nexis Library, UPI File 5

C.A. Cooke, *Corporation, Trust and Company* (1950) 21

D. Jenkins, *Skinning the Pantomime Horse: Two Early Cases on Limited Liability*, 34 Cambridge L.J. 308 (1975) 18

E. Dodd, *American Business Corporations Until 1860* (1954) 16

J.C. Wallace *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913 (1983) 9, 23

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J.K. Angell & S. Ames, *A Treatise on the Law of Private Corporations Aggregate* (1832) 17

M.F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251 (1989) 23

O. Handlin & M. Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1 (1945) 19

P. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (1987) 11, 15

R.B. Ginsburg & P.W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417 (1987) 23

R.L. Stern, E. Gressman & S.M. Shapiro, *Supreme Court Practice* (6th ed. 1986) 26

S. Estreicher & J.E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984) 23

Story, *Commentaries on Equity Jurisprudence, As Administered in England and America* (Boston 1836) 19, 21

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Petitioners,

vs.

Walter Industries, Inc., et al.,

Respondents.

BRIEF FOR RESPONDENTS WALTER INDUSTRIES, INC. AND CERTAIN OTHER DEBTORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents are Walter Industries, Inc. (formerly Hillsborough Holdings Corporation) and all the other debtors in certain administratively-consolidated Chapter 11 cases ("Debtors") pending in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division.[1] Respondents respectfully submit that after three lower courts have considered the Petitioners' arguments

1. Respondents' statement pursuant to Rule 29.1 is Appendix A to this Brief.

after three lower courts have considered the Petitioners' arguments and rejected them in unpublished decisions, this case does not merit any further review.

Contrary to the Petition, the question here is *not* the right to a jury trial in a personal injury lawsuit. Debtors are not trying to deprive Petitioners of jury trials on personal injury claims. Personal injury claims are being asserted—and tried to juries—in other, separate lawsuits against other parties.

The absence of any damages claims in this action is the result of a choice *by the Petitioners*. Before Debtors' bankruptcy, in 1989, the Petitioners decided to pursue a two-track strategy. On one track were personal injury claims, litigated against asbestos manufacturers. The other track involved an attempt to use the equitable powers of the courts to undo the leveraged buyout (or "LBO") of the Jim Walter Corporation. This second track sought to create an equitable fund from which unsatisfied judgments—that might be obtained in the future in other lawsuits against other parties—might be paid.

That two-track strategy continued when the Debtors went into bankruptcy. The Petitioners did not assert *any* counterclaims for damages in this adversary proceeding. They did not file *any* claims for damages in this bankruptcy. At every step of these proceedings they made it clear that they did *not* want their personal injury claims tried in this action. The only things they wanted decided in this action were technical corporate law questions.

Thus, contrary to the Petition, this case does not raise any question about the right to a jury trial on personal injury claims or claims for damages. It raises only the question about the right to a jury trial on the peculiar facts of this case, given a procedural posture developed in multiple lawsuits over a number of years.

Also contrary to the Petition, there is no dispute about the law that governs these issues. Every court that has considered this or similar issues agrees that the controlling law is the time-honored analysis most recently set forth in this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). That analysis looks primarily to the nature of the remedy sought in each particular case. Differences in decisions arise from differing sets of facts, not from conflicts on the law.

Nor is there any reason to find that this settled law was misapplied in this case. Three separate courts have applied the analysis set forth in *Granfinanciera* to the facts of this case. Those three courts rejected the Petitioners' claims, and all three did so in unpublished opinions.

Respondents submit that the application of settled law to particular facts, in unreported decisions, does not justify review by this Court. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Jim Walter Corporation

This case arises from the 1987 leveraged buyout of the Jim Walter Corporation ("JWC"). JWC had its start in 1946, when Jim Walter and Lou Davenport founded "Davenport & Walter," building and selling homes with completed exteriors and unfinished interiors. By 1987 JWC had grown to a New York Stock Exchange company with $2.43 billion in revenues.

One of JWC's subsidiaries was The Celotex Corporation ("Celotex"), which it acquired in the early 1960s. In 1972 Celotex bought Panacon Corporation ("Panacon"). Celotex had never been named as a defendant in an asbestos related action, but after that acquisition Celotex was repeatedly named as a defendant in such lawsuits, primarily based on Panacon's pre-1972 activities. By

1987, approximately 59,000 such suits were pending against Celotex.

In July 1987, following an auction in which several substantial bidders—including a group affiliated with CitiBank and a group led by PaineWebber—made competing bids for JWC, the Board accepted a bid of $60 per share from a group led by the investment firm of Kohlberg Kravis Roberts & Co.

The acquisition of JWC and its subsidiaries was completed in early 1988. As a result Hillsborough Holdings Corporation, later named Walter Industries, acquired ownership of virtually all of JWC's subsidiaries. Celotex was sold to a third-party in April 1988.

The 1989 Lawsuits

In early 1989, a purported class action lawsuit was filed against Walter Industries in United States District Court in Beaumont, Texas: *Cimino et al. v. Raymark Industries, et al.* That suit sought to pierce the corporate veil between Celotex and JWC and create a fund from which future claimants might seek payment if their damage claims against Celotex—being litigated in other lawsuits—were not satisfied. Significantly, at the time the suit was filed there had never been an unsatisfied damage judgment against Celotex. The entire thrust of *Cimino* related to future claims against Celotex that *might not* be completely satisfied.

The District Court in *Cimino* recognized that this claim raised corporate law issues, and was not an asbestos personal injury claim. The court severed the corporate law claims from the personal injury claims against other defendants, including Celotex. The Petitioners did not object.

In July 1989 the asbestos claimants filed a lawsuit in state court in Beaumont, Texas: *Larned et al. v. Kohlberg, Kravis, Roberts & Co. et al.* As with *Cimino*, the *Larned* lawsuit did not

assert any asbestos personal injury claims. All the plaintiffs in the *Larned* action already had personal injury claims pending against Celotex in other courts. The relief sought in *Larned* was equitable: creation of a fund that might be used—in the future—to pay unsatisfied judgments against Celotex. When *Larned* was filed there had never been an unsatisfied personal injury judgment against Celotex. The entire thrust of *Larned* was the future, seeking an equitable structure that might be used to pay judgments obtained in personal injury cases in other courts.[2]

The HHC Bankruptcy

Respondents filed for bankruptcy on December 27, 1989, due to a potential default in approximately $624 million high-yield bonds issued in connection with the LBO. In early January 1990, Respondents filed this adversary proceeding. They sought a declaratory judgment that the corporate veil between JWC and Celotex could not be pierced and that there was no basis for a fraudulent conveyance claim against them. They named as defendants Celotex and the individual asbestos plaintiffs who had sued any of the Respondents.

Petitioners filed an answer denying the relief sought. But they did not counterclaim for damages; they did not suggest that the action involved any claims for damages.

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2. When the *Larned* complaint was filed, counsel for Petitioners stated:

> The class action itself will not yield any damages for those three [named class representatives] or for the other asbestos victims, but attempts to make sure that money will be available for damage payments for asbestos victims winning lawsuits against Celotex and Jim Walter.

Asbestos Victims Seek Corporation Liability, UPI, July 13, 1989, *available in* LEXIS, Nexis Library, UPI File.

In fact, although Petitioners included a *pro forma* jury demand in their answer, they sought affirmative *equitable* relief. Their Answer concludes with this clause: "WHEREFORE, the Asbestos Defendants request that the Court dismiss the complaint for lack of jurisdiction. In the alternative, they request that the Court enter judgment in their behalf, *that it declare the rights and legal relations of the parties hereto*, and that it award costs, attorneys fees and such other relief as the Court deems appropriate in the circumstances." (emphasis added).

Summary Judgment Proceedings

After discovery, Respondents moved in April 1992 for summary judgment limited to the veil-piercing claim. On August 25, 1992, the Bankruptcy Judge issued a decision. He denied complete summary judgment, finding disputes as to certain factual inferences. He found, however, as permitted by Fed. R. Civ. P. 56(b), that certain facts were without dispute. These included:

- Under a centralized cash management system, Celotex had its own bank accounts, "collected its own receivables and paid its own payables. . . ." *See* Appendix B at A-9.
- Celotex had its own Board of Directors, its own minute books and its own accounting records. *Id.* at A-11.
- JWC officers monitored the performance of subsidiaries through a reporting structure but "did not perform management functions or act in a decision-making capacity . . . ." *Id.* at A-12.

The full scope of the decision can be seen in this statement by the Bankruptcy Court:

> What is involved is an attempt to destroy the separate legal existence of an entity which was properly created

and functioned as a bona fide corporation, which fully complied at all times with all the formalities required by applicable law. *Id.* at A-14.

The Bankruptcy Court concluded that although the underlying facts were undisputed, certain limited inferences from those facts should be resolved by trial. Trial is set for December 13, 1993.

The Jury Trial Issues

The Petitioners moved to withdraw the reference, on the grounds that they were entitled to a jury trial on the veil-piercing claims. They relied on the Second Circuit's decision in *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131 (2d Cir. 1991). The District Court, in an unreported decision, found that *Passalacqua* did not apply in this case, because the nature of the relief being sought was plainly equitable, unlike *Passalacqua*. *See* Petitioners' Appendix at 34a.

The Petitioners sought a writ of mandamus from the Eleventh Circuit, which was denied without opinion. *See* Petitioners' Appendix at 40a. The Petitioners did not seek rehearing, nor did they ask the Eleventh Circuit to clarify the grounds for its decision. Their failure to seek clarification was not due to any sense of urgency; they waited the full 90 days permissible before filing their Petition.

REASONS NOT TO GRANT THE WRIT

SUMMARY

Petitioners ask this Court to grant review based on nothing but speculation. They suggest that review might be proper: "*if*" the Eleventh Circuit ruled on the merits of their Seventh Amendment jury trial claim; or "*if*" the Eleventh Circuit ruled on the general availability of mandamus in these types of cases; or "*if*" the

Eleventh Circuit ruled that mandamus would lie *if*, and only *if*, Petitioners could show that they had a "clear and indisputable" right to a jury trial.[3] "There are too many 'ifs' in that proposition to make review appropriate at this stage." *California v. Rooney*, 483 U.S. 307, 312-13 (1987)(per curiam)(dismissing writ of certiorari as improvidently granted).

The Petition's arguments about conflicts among the circuits have no basis in the record. *First*, there is no dispute among the circuits about the law to be applied. Every court cited by Petitioners has applied the analysis most recently set forth in this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989): (i) was the form of action in law or in equity in the Courts of England in 1791, and (ii) is the nature of the relief being sought legal or equitable. The only issue on this Petition is whether courts below properly applied that analysis to the facts of this case.

The Second Circuit's decision in *Passalacqua* does not create a conflict on the law.[4] It merely applied the analysis set forth in *Granfinanciera* to a different set of facts. A difference resulting

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3. *See* Petition for a Writ of Certiorari, at 9, 12-14 (hereafter "Petition")(speculating: "If the Eleventh Circuit's denial of mandamus rested on a determination that petitioners have no constitutional right to a jury trial"; "if the Eleventh Circuit's denial of mandamus rests on a determination that mandamus is not generally available to review the improper denial of a jury trial"; or "If the Eleventh Circuit accepted respondents' alternative contention that mandamus should be denied because petitioners did not show a 'clear and indisputable' right to a jury trial").

4. Petitioners note that several courts have allowed jury trials in veil-piercing actions. *See* Petition at 10 n.5. As the District Court observed, simply because veil piercing *may* be tried to a jury does not mean the Seventh Amendment *requires* it.

from the application of settled law to differing sets of facts does not create a "conflict" between the circuits.

Indeed, even if the Eleventh Circuit did silently reject the Second Circuit's discussion of legal history in *Passalacqua*, that would not create a conflict. Without a second appellate decision that addresses the question, this Court lacks "the reasoned alternatives from which . . . [it] can derive a more informed analysis." J.C. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913, 929 (1983). This is particularly true on a subject as obscure as the types of action available in equity and law in 18th century England.

The Petitioners suggest that since there is no way to find a conflict from the face of the Eleventh Circuit's order, this Court should force the Eleventh Circuit to write an opinion to give the Petitioners something to work with. Last term the Eleventh Circuit decided over 1,000 cases by summary order. If failure to write an opinion is grounds for granting certiorari, then this Court's case-load has just become unmanageable.

Second, there is no conflict about the use of mandamus to correct the erroneous denial of jury demands. No circuit has deviated from this Court's admonition in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), that it is "the responsibility of the Federal Courts of Appeals to grant mandamus *where necessary* to protect the constitutional right to trial by jury." 369 U.S. 469, 472 (1961)(emphasis added). The Seventh Circuit has tried to define "necessity" in jury trial situations. *See First National Bank of Waukesha v. Warren*, 796 F.2d 999, 1001-06 (7th Cir. 1986) (Easterbrook, J.). Several other circuit panels have used different language in describing the standards to be used in evaluating requests for mandamus. But differences in language, in *dicta*, have

never warranted certiorari review. "This Court 'reviews judgments, not statements in opinions.'" *Rooney*, 483 U.S. at 311 (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

It is thus clear that there is nothing for this Court to review. There is no conflict about the legal analysis to be used in judging the merits. There is no conflict about the standards used in mandamus cases. And on the merits, the lower courts were clearly correct. The Petition should be denied.

I. THERE IS NO INTERCIRCUIT CONFLICT OVER PETITIONERS' LACK OF A SEVENTH AMENDMENT RIGHT TO JURY TRIAL

The proper legal standard to be used in determining if there is a right to a jury trial is not in dispute. Well-established, it was most recently set forth by this Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989), in which this Court quoted *Tull v. United States*, 481 U.S. 412, 417-18 (1987); *see also Curtis v. Loether*, 415 U.S. 189, 196 (1974). The analysis requires the court to look at the historical roots of the cause of action and at the nature of the relief sought. The only question raised by the Petition is whether that settled law was properly applied to the facts in *this* case involving particular claims to pierce the corporate veil.

Petitioners point to the Second Circuit's decision in *Passalacqua*, the only circuit court to address a veil-piercing claim. They argue that, *if* the Eleventh Circuit denied their mandamus request on the merits of their Seventh Amendment claim, *then* the ruling conflicts with the Second Circuit's decision in the *Passalacqua* case. That is wrong. Both cases applied the same law, but to different facts.

In *Passalacqua*, the Second Circuit held that because the historical origins of veil piercing were unclear,[5] and the remedy sought in that case—*the enforcement of a sum certain judgment*—appeared to be legal, the Seventh Amendment required a jury trial. 933 F.2d at 136. As required by this Court's decision in *Granfinanciera*, the Second Circuit focused on the nature of the remedy in the case before it. Given that the remedy sought in this case is different from that sought in *Passalacqua*, it is not surprising that the results were different. That difference does not create a "conflict."

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5. The Second Circuit looked at the old two-part creditors' bill:

> The first part was *a proceeding in equity* "instituted by any creditor with an unsatisfied judgment, usually on behalf of all creditors, against the corporate debtor," the purpose of which was to adjudge the extent of total corporate liability to the group of creditors. Blumberg, *The Law of Corporate Groups* § 2.02 at 53. The second part was an action at common law against the shareholders individually to collect the amount owed in which only personal defenses were allowed to be raised.

933 F.2d at 136 (emphasis added).

This historical analysis was mistaken. In fact, Professor Blumberg was referring to the evolution of the creditors' bill in the United States. *See* P. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 2.02 at 52-53 (1987). The relevant inquiry is about *British* legal history. *See Granfinanciera*, 492 U.S. at 42.

But even if the *Passalacqua* analysis were correct, that would not change the result here. *Passalacqua* recognized that the first part of the creditors' bill was *clearly equitable*. And that first part of the creditors' bill is clearly analogous to this case: an action on behalf of all creditors to adjudge the extent of total corporate liability.

II. THE DECISIONS BELOW WERE CORRECT; PETITIONERS HAVE NO SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Although the Petition tries to characterize the issue here as a "conflict," in fact the Petitioners are asking this Court to review this case to see if settled law was properly applied. That would be a waste of this Court's resources; the courts below were correct.

In determining whether the Seventh Amendment requires a jury trial in a particular case, a court must first compare the subject action to "'18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.'" Then, the court should "'examine the remedy sought and determine whether it is legal or equitable in nature.' The second stage of this analysis is more important than the first." *Granfinanciera*, 492 U.S. at 42. That analysis was followed by the courts below.

A. The Pleadings In This Action Seek Equitable Relief; Consistent With The *Larned* Complaint, The Petitioners Did Not Ask For Damages

Petitioners have continuously mischaracterized the proceedings below. This is not a personal injury action. The Adversary Proceeding does not address the merits of any products liability claim. Those who seek damages for asbestos-related injuries will continue to pursue their legal remedies in direct claims against Celotex and others.

Respondents seek a judgment declaring that the corporate veil separating Celotex from JWC was intact. This action is clearly equitable. There is no reference to damages in the complaint—or in the answer. Indeed, the Petitioners' Answer seeks only equitable relief, not damages, by way of counterclaim.

Determining the nature of the claims in this action requires looking beyond the fact that it is a declaratory judgment action. "Actions for declaratory judgments are neither legal nor equitable, and courts have therefore had to look to the kind of action that would have been brought had Congress not provided the declaratory judgment remedy." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 284 (1988).

The issue is thus how the veil-piercing claim in this case would be treated if it had been brought as an affirmative claim by the Petitioners. That is simple. The Petitioners had already brought an affirmative action dealing with these issues—*Larned*—and it was clearly equitable.

In *Larned*, the Petitioners sought to pierce the corporate veil. They did not seek damages.[6] They sought an injunction, an accounting, a reconveyance of assets, a receivership and a constructive trust, all of which are traditionally equitable remedies.

Petitioners would now like to re-characterize *Larned* as a personal injury class action against JWC. *See* Petition at 21 n.13. That attempt comes rather late. In earlier pleadings in this action counsel for the Petitioners denied that either *Larned* or the Adversary Proceeding was a tort suit for asbestos-related injuries. He stated on January 22, 1990, that "[t]his is not a personal injury action. . . . The *Larned* case—is an action seeking a Court Order piercing the corporate veil." Then, in the Asbestos Defendants'

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6. There was an alternative request for damages but only as a substitute for equitable relief. The *Larned* complaint asked that if assets had been transferred and were beyond the court's equitable powers, damages be awarded as compensation. But even this damage award would have gone into some type of trust to pay unspecified future claims. Not a single member of the class had any claim when *Larned* was filed that they had been damaged in any amount.

Statement of Grounds for Objections to the Bankruptcy Judge's Proposed Findings of Fact and Conclusions of Law and Recommendation Concerning Their Motion for Abstention, counsel stated:

> *Cimino* is one of literally thousands of garden variety tort cases asserting liability for asbestos injuries. Like many such cases, it includes allegations of veil piercing to Jim Walter which have never been pursued. . . . *Cimino* is a "red herring." . . . It is the *Larned* action, not *Cimino*, that the Debtors are trying to avoid . . . [*Larned*] is undoubtedly the state action that is at issue.

Based on the words of counsel for Petitioners, this is an action involving claims for equitable relief by both parties. It is not a personal injury action. It does not involve claims by either party for a sum certain. These facts alone resolve the jury trial issue, no matter what the historical analysis might show.

B. Piercing The Corporate Veil Is Historically An Equitable Action

In fact, the historical analysis supports the lower courts. In this area the Petition is inaccurate on two points. First, it suggests there were common law antecedents to piercing the corporate veil. There were none. Second, it claims that there was no equitable right to pierce the corporate veil. In fact, by 1791 there were established equitable remedies against shareholders who abused the corporate form.

1. There was no right to pierce the corporate veil at common law; in fact the common law precluded any such action

Petitioners admit that the doctrine of piercing the corporate veil has *no* roots in the English common law as it existed prior to 1791. *See* Petition at 16 and 18 n.11.

Lacking a common law pedigree for veil piercing, they create one. They adopt *respondeat superior* and agency as their rightful lineage, but do not cite a single authority linking those doctrines and piercing the corporate veil. *See* Petition at 17-18 & n.11. If *respondeat superior* and agency were legal substitutes for equitable veil-piercing, it is truly surprising that not a single case or commentator from the 18th or 19th century noted this fact.

Citing Professor Blumberg, Petitioners argue that veil piercing "closely resemble[s] *respondeat superior* and agency," and thus is legal by analogy. *Id.* But Professor Blumberg's own language defeats this claim. He notes that the concept of agency, as used in veil-piercing cases, is merely "metaphorical":

> [T]he term has no precise meaning. The courts employing the term have simply concluded for reasons unrelated to a consensual common law agency relationship that the parent and subsidiary for legal purposes constitute a single entity, thereby supporting the imposition of liability on the parent. *By contrast, in the common law agency cases, the concepts of principle and agent recognize the separateness of the two entities.*

P. Blumberg, *The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* § 6.06.2 at 128 (1987)(emphasis added).

In fact, far from permitting actions to pierce the corporate veil, the common law affirmatively precluded such actions. Blackstone stated:

> *The debts of a corporation*, either to it or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities: agreeable to the maxim of the civil law, "si quid universtati debetur, singulis non debetur; nec, quod debet universitatis, singuli debent."

1 William Blackstone, Commentaries * 472.

Subsequent commentators noted "that, although Blackstone's statement was merely that the members are not liable after dissolution, the maxim which he quoted in explanation stated that they are not liable at all." E. Dodd, *American Business Corporations Until 1860* 85 (1954). *See also* 8 W. Holdsworth, *A History of English Law* 203-04 (1937)("As early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation."); A.B. DuBois, *The English Business Company After the Bubble Act, 1720-1800* 146 n.51 (1938)(quoting *A Letter to a Member of Parliament Touching the Late Intended Bank* (1721))("A particular member of an incorporated society, cannot, by the rules of Law, be sued nor any action grounded against him for a debt which is not due from him in particular, but from the whole society in general."); *see also Edmunds v. Brown & Tillard*, 1 Lev. 237, 83 Eng. Rep. 385 (1668)(no action lies at common law against shareholders of dissolved corporation on corporate debt); *Case of the City of London*, 1 Ventr. 351, 86 Eng. Rep. 226 (1680)("a duty or charge upon a corporation, every particular member thereof is not liable").

The same rule held true in America. *See* 2 J.S. Davis, *Essays in the Earlier History of American Corporations* 317 (1917); J.K. Angell & S. Ames, *A Treatise on the Law of Private Corporations Aggregate* 349 (1832)("No rule of law we believe is better settled, than that, in general, the individual members of a private corporate body are not liable for the debts, either in their persons or in their property, beyond the amount of property which they have in the stock.")

2. By 1791 the English courts of equity had a well-established jurisprudence permitting actions against shareholders who abused the corporate form

Unable to show a basis in common law for veil piercing, Petitioners make the unsupported claim that veil piercing did not originate in the English Courts of Equity. *See* Petition at 16. They are mistaken. Precisely because there was no relief at law, the Chancellor provided remedies against corporate shareholders as early as the late 17th Century, beginning with *Dr. Salmon v. The Hamborough Company*, 1 Ch. Cases 204 (1671).

In that case, the Hamborough Company borrowed £2000 from Dr. Salmon and then defaulted. With no remedy at law, Dr. Salmon filed a bill in the High Court of Chancery, naming the Corporation and several shareholders personally. At first, the Chancellor dismissed the plaintiff's bill because: (1) the corporation had nothing distrainable; and (2) the shareholders were not personally liable. *See* 1 Ch. Cases at 204-05.

On appeal, the House of Lords reinstated the bill and directed the Chancellor to order the corporate officers to:

> make such a Leviation upon every Member of the said Company as is to be contributory to the Public Charge, as shall be sufficient to satisfy the said Sum to be decreed

> to the Plaintiff in that Cause, and to collect and levy the same, and to pay it over to the Plaintiff as the Court shall direct. . . . [A]nd so many of them as by the Constitution of the said Charter do make a *Quorum*, shall not make or return such Leviations, as aforesaid the Lord Chancellor or Lord Keeper may issue Process of Contempt against them, as is usual against Persons in their Capacities.

Id. at 207. *See also Harvey v. East-India Company*, 2 Vernon's Cases in Chancery 396 (1700)("In the case between *Dr. Salmon* and the *Hamborough Company*, the members in their private persons were made liable, the *Company* having no goods.").

Dr. Salmon was quintessentially a veil-piercing case. A court of equity held shareholders accountable for corporate debt, even though they were *not* personally liable at law. One scholar has argued that the *Salmon* doctrine was an early creditors' remedy against corporate fraud. *See* D. Jenkins, *Skinning the Pantomime Horse: Two Early Cases on Limited Liability*, 34 Cambridge L.J. 308 (1975)("lifting the veil is no modern innovation and . . . [*Dr. Salmon* is] properly to be understood in terms of a lifting of the veil so as to defeat the wrongful use of the real personality of a corporation.").

Dr. Salmon is a direct precursor to the present litigation. Petitioners seek to pierce the Celotex veil on the theory that JWC stripped Celotex of assets in order to defraud contingent creditors of Celotex. Florida law, which controls in this case, similarly requires that a plaintiff prove shareholder fraud before a court will pierce the corporate veil. *See Dania Jai-Alai Palace, Inc. v. Sykes*,

450 So.2d 1114, 1117-21 (Fla. 1984). Not much has changed in three hundred years.[7]

By the end of the 17th century, the chancellor imposed trusts upon shareholders who had taken corporate dividends or capital in fraud of creditors.[8] *See Naylor v. Brown*, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673).[9] Put in modern terms, equity was dealing

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7. *Dr. Salmon* was not the isolated case Petitioners suggest. *See* Petition at 18 & n.12. In fact, "[*Dr. Salmon*] remained law throughout the eighteenth century." O. Handlin & M. Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1, 13 (1945).

8. Directly on point in early American jurisprudence is Justice Story's discussion in his *Commentaries on Equity Jurisprudence, As Administered in England and America* (Boston 1836).

> Thus, for example, the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation; and no shareholder can entitle himself to any dividend or share of such capital stock until all the debts are paid. And if the capital stock should be divided, leaving any debts unpaid, every shareholder, receiving his share of capital stock, would in Equity be held liable pro rata to contribute to the discharge of such debts out of the fund in his own hands.

Id. at 499; *see also Wood v. Drummer*, 3 Mason 308, Fed. Cas. No. 17,944 (1824)(doctrine has "long been established"); *cf. Vose v. Grant*, 15 Mass. Rep. 505, 521 (1819)(dismissing common law action against shareholders of a bank but discussing available remedy in equity). Thus, it was well established in early 19th century America that equity offered the sole remedy against shareholders who had taken corporate funds to the detriment of creditors.

9. Petitioners claim that the "corporate trust fund" doctrine "has never been recognized in England, nor does it exist under the common law." Petition at 18 n.12 (quoting 15A W. Fletcher, T. Bjur & J. Reinholtz, *Fletchers' Cyclopedia of the Law of Private Corporations* § 7371 at 55 (1990)). Naturally, a wholly equitable doctrine was not recognized at common law. And Fletcher's statement that it was not recognized in English equity is wrong, given the early English decision in *Naylor v. Brown*, Rep. Temp. Finch 83, 23 Eng. Rep. 44 (1673).

with a claim that the shareholders had "stripped" the corporation of its capital, which is the essence of both the Adversary Proceeding and the *Larned* action.

Concerns for efficiency and basic fairness were strong policy reasons for limiting direct actions against shareholders to courts of equity. One British legal historian has observed:

> [T]he indirect imposition of liability in Salmon's case was an equitable decision; and it has been noted that *a suit in equity accomplished the establishment of a fund for creditors where a plea at common law has failed.* These powers in company and partnership law had been acquired by the Court of Chancery in the course of some centuries because its particular organization made it much more efficient than the common law courts in dealing with funds. Where a cause arose concerning relations of parties concerned in a fraud or estate, and accounts had to be taken in consideration, the Court of Chancery was able to go farther and with greater ease than the common law. There was an action at common law but it had very limited application and even where it could be used the *superior machinery and remedies of the Chancery gave the court a practical monopoly of the field.*
>
> By reason of this *virtually exclusive jurisdiction the field of company law was dominated by equity* and the actual legal ownership of the capital fund mattered little so long as the equitable interests of the members in the fund were firmly established.

C.A. Cooke, *Corporation, Trust and Company* 84 (1950)(emphasis added).

Justice Story's *Commentaries on Equity Jurisprudence*, discussing equitable trusts, states:

> This, however, is a remedy, *which can be obtained in Equity only; for a Court of Common Law is incapable of administering any just relief*; since it has no power of bringing all the proper parties before the Court, or of ascertaining the full amounts of the debts, the mode of contribution, the number of the contributors, or the cross equities and liabilities, which may be absolutely required for a proper adjustment of the rights of all parties, as well as of the creditors.

Story, at 499-500 (emphasis added).[10]

These considerations remain as valid today as they were in 1791. Indeed, this case is a clear example of why the flexibility of a court's equitable powers is an essential part of this Seventh Amendment analysis. *Cf. Ross v. Bernhard*, 396 U.S. 531, 538 n.4 (1970) (considering the "practical abilities and limitations of juries" as a potential factor in Seventh Amendment analysis); *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987)(same). Petitioners are seeking to "unwind" an LBO of a company with over $2 billion in assets. Although JWC was the only shareholder of Celotex, piercing

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10. *See also* Angell & Ames, at 351, noting that claims against shareholders should be limited to equity, because of the joint and several liability provisions of common law tort actions. If an action at common law were allowed:

> the consequences would be [that] "any of the stockholders might be sued alone: because in an action founded on tort, it is not necessary to join all the wrongdoers: and the defendant cannot, in such a case, plead the omission of the others in abatement. Secondly, the individual who was sued would be liable to the whole extent of the injury complained of, without regard to the amount which he had received on the division of the stock."

Id. (quoting *Vose v. Grant*, 15 Mass. Rep. 505, 521 (1819)).

the corporate veil would affect the rights of multiple debt issuers, thousands of creditors, and a variety of equity holders, as well as previous holders of JWC stock. That difficult task belongs in equity today, just as it did in 1791.

III. THERE IS NO CONFLICT ABOUT THE APPROPRIATE STANDARD TO USE IN EVALUATING PETITIONS FOR MANDAMUS WHERE JURY TRIAL ISSUES ARE RAISED

After devoting a substantial amount of the Petition to arguing the merits, the Petitioners do a 180-degree turn and ask this Court to *assume* that the Eleventh Circuit did *not* deny their mandamus request on the merits. Under this alternative theory, the Petitioners argue that their petition for mandamus was denied because the Eleventh Circuit found: (1) they have an adequate remedy by direct appeal; or (2) they failed to establish their right to a jury trial by clear and indisputable proof. *See* Petition at 13-14.

According to Petitioners, either rationale creates a circuit split. Of course, since no one knows the basis for the Eleventh Circuit's ruling, Petitioners' argument can only create a conflict by conjecture. Since this alleged conflict is also directly contrary to the first half of the Petition, it is clear that they are asking this Court to create a conflict where none exists from the face of the Order.

In fact, there would be no conflict even if the Eleventh Circuit had used the language the Petition suspects could have been used. The Petition's "conflict" consists of nothing more than different circuit courts using different language to express the same two concepts: (i) mandamus is a discretionary remedy and (ii) the right

to a jury trial is an important right that should be protected. Differences in words do not require this Court's intervention.[11]

A. There Is No Conflict About The Nature Of Mandamus; It Is An Inherently Discretionary Remedy

The law is clear that mandamus is a discretionary remedy. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980)(per curiam); *see also Mallard v. United States District Court*, 490 U.S. 296, 309 (1989); *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). Additionally, those seeking mandamus must show that without it, they lack an adequate appellate remedy, *see Mallard*, 490 U.S. at 309; *Allied Chemical*, 449 U.S. at 36, and that they have a "clear and indisputable" right to the relief they seek by mandamus. *See Mallard*, 490 U.S. at 309;

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11. Even if there are conflicts in the language used to describe the appropriate standards for mandamus on the issue of right to a jury trial, that does not merit review by this Court. *See* R.B. Ginsburg & P.W. Huber, *The Intercircuit Committee*, 100 Harv. L. Rev. 1417, 1434 n.96 (1987).

First, this type of conflict will not spawn forum shopping. It is unlikely that a party will choose a circuit on the basis of that jurisdiction's particular forumlation of the mandamus standard. *See*, M.F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1256 (1989); S. Estreicher & J.E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 725 (1984).

Second, because mandamus is an interlocutory *trial procedure*, this conflict does not in any way affect multi-circuit parties' substantive transactions. *See* Sturley, 67 Tex. L. Rev. at 1270-71; Estreicher & Sexton, 59 N.Y.U. L. Rev. at 725; J.C. Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 Cal. L. Rev. 913, 930 (1983).

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)(citation omitted).

Unless this Court is to impose an automatic right to appeal whenever a jury trial claim is asserted, mandamus will remain a discretionary form of review. Given that fact, it is difficult to see how varying the words used to describe that review will have an influence on decisions by circuit courts.

This does not mean that this Court's decisions on the right to a jury trial are being disregarded. The lower courts all understand the fundamental importance of that right. In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), this Court stated that it is "the responsibility of the Federal Courts of Appeals to grant mandamus *where necessary* to protect the constitutional right to a trial by jury." *Id.* at 472 (emphasis added).

However, Petitioners take this language, and language contained in *Ex Parte Simons*, 247 U.S. 231, 239 (1918), and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959), and try to create an automatic interlocutory appeal—as-of-right—from *any* denial of a jury demand. *See* Petition at 22. That is not what this Court has held.

Simons, *Beacon Theatres* and *Dairy Queen* are examples of the proper use of mandamus. In all three cases, mandamus was appropriate due to the absence of an adequate appellate remedy. *See Beacon Theatres*, 359 U.S. at 504-05; *see also First National Bank of Waukesha v. Warren*, 796 F.2d 999, 1003-04 (7th Cir. 1986). This Court did not create an automatic appeal as of right for all jury trial claims.

B. There Is No Conflict About The Grant Of Mandamus In Jury Trial Matters

Petitioners contend that other courts have created an automatic right to appeal and that the failure to grant them such a right in this case is a "conflict" between the circuits. *See* Petition at 13-14. They misread those cases. Although the language varies, these opinions apply normal mandamus standards. To the extent that they deal with the right to a jury trial, they recognize its importance without creating an automatic appeal.[12]

The Petition cites a Seventh Circuit decision holding that the use of mandamus is appropriate when "a clear right to a jury [can]not be vindicated on appeal." *First National Bank of Waukesha v. Warren*, 796 F.2d at 1006; *see also Mallard*, 490 U.S. at 309; *cf. In re Don Hamilton Oil Co.*, 783 F.2d 151 (8th Cir. 1986)(holding that clear and indisputable legal right is necessary for mandamus). This is not a conflict. If it is clear that an important

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12. *See Wilmington Trust v. United States District Court*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992)(mixed question of law and admiralty is directly analogous to *Beacon Theatres* and the same rationale applies); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967 (9th Cir.1983)(same); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982)(no discussion of mandamus standards and superseded by *In re Don Hamilton Oil Co.*, 783 F.2d 151 (8th Cir. 1986)); *Maldonado v. Flynn*, 671 F.2d 729 (2d Cir. 1982)(no discussion of mandamus standards); *In re Zweibon*, 565 F.2d 742 (D.C. Cir. 1977)(remanded for district court to consider timely jury demand); *In re Union Nacional de Trabajadores*, 502 F.2d 113 (1st Cir. 1974), *opinion withdrawn*, 527 F.2d 602 (1st Cir. 1975)(right to jury trial in criminal case); *Eldredge v. Gourley*, 505 F.2d 769 (3d Cir. 1974)(per curiam)(same fact pattern as *Beacon Theatres*); *Filmon Process Corp. v. Sirica*, 379 F.2d 449 (D.C. Cir. 1967) (no clear and indisputable legal right); *General Tire & Rubber Co. v. Watkins*, 331 F.2d 192 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964)(holding, without discussion, that "exceptional circumstances" did not exist); *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1957)(writ issued to avoid foreclosure of appellate remedy by collateral estoppel).

right *cannot* be vindicated on appeal, then one of the basic requirements of mandamus has been met: no adequate remedy on appeal. The Seventh Circuit did not, however, state that mandamus was proper even if there was *no* showing of a lack of adequate remedy on appeal.

Petitioners are pointing to conflicts in words, not judgments. That does not merit review. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)("this Court reviews judgments, not opinions"); R.L. Stern, E. Gressman & S.M. Shapiro, *Supreme Court Practice* § 4.3, at 196 (6th ed. 1986)("there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized").

CONCLUSION

This case will not resolve any principles of law or settle any conflicts. The facts are so unique, and the law so controlled by those facts, that a resolution of this case would do nothing but resolve *this case*. It is not this Court's role to sit as the *fourth* chance for Petitioners to argue their claims. Accordingly, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated:New York, New York
August 18, 1993

Respectfully submitted,

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APPENDIX

APPENDIX A

RESPONDENTS RULE 29.1 STATEMENT

A. *Debtors*

Walter Industries, Inc. (formerly Hillsborough Holdings, Inc.)
Best Insurors, Inc.
Best Insurors of Mississippi, Inc.
Coast to Coast Advertising, Inc.
Computer Holdings Corporation
Dixie Building Supplies, Inc.
Hamer Holdings Corporation
Hamer Properties, Inc.
Homes Holdings Corporation
Jim Walter Computer Services, Inc.
Jim Walter Homes, Inc.
Jim Walter Insurance Services, Inc.
Jim Walter Resources, Inc.
Jim Walter Window Components, Inc.
JW Aluminum Company
JW Resources Holdings Corporation
J.W.I. Holdings Corporation
J.W. Walter, Inc.
JW Window Components, Inc.
Land Holdings Corporation
Mid-State Homes, Inc.
Mid-State Holdings Corporation
Railroad Holdings Corporation
Sloss Industries Corporation
Southern Precision Corporation
United Land Corporation
United States Pipe and Foundry Company
U.S. Pipe Realty, Inc.
Vestal Manufacturing Company
Walter Home Improvement, Inc.
Walter Land Company
JW Resources, Inc.

B. *Direct and Indirect Parents of the Debtors*

Kohlberg Kravis Roberts & Co.
KKR Partners II, L.P.
JWC Associates, L.P.
JWC Associates II, L.P.

C. *Direct and Indirect Subsidiaries of the Debtors*

JW Aluminum Company
Homes Holdings Corporation
JW Resources Holdings Corporation
JW Window Components, Inc.
Vestal Manufacturing Company
Sloss Industries Corporation
Southern Precision Corporation
Mid-State Holdings Corporation
United State Pipe and Foundry Company
Railroad Holdings Corporation
Computer Holdings Corporation
Jim Walter Computer Services, Inc.
Land Holdings Corporation
Walter Land Company
J.W.I. Holdings Corporation
J.W. Walter, Inc.
U.S. Pipe Realty, Inc.
Hamer Holdings Corporation
Hamer Properties, Inc.
Jim Walter Window Components, Inc.
Walter Home Improvement, Inc.
Jim Walter Homes, Inc.
Best Insurers, Inc.
Best Insurers of Mississippi, Inc.
Jim Walter Insurance Services, Inc.
Mid-State Homes, Inc.
Coast to Coast Advertising, Inc.
United Land Corporation
Dixie Building Supplies, Inc.

Jim Walter Resources, Inc.
Jefferson Warrior Railroad Company, Inc.
U.S. Industrial Products, Inc.
Cardem Insurance Co., Ltd.
Black Warrior Methane Company
Black Warrior Transmission Company

D. *Other Entities*

The Celotex Corporation
Jim Walter Corporation
Drexel Burnham Lambert Group, Inc.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case Nos. 89-715-8P1 through 89-9746-8P1

In re:

HILLSBOROUGH HOLDINGS CORPORATION, et al.,

Debtors,

Adv. No. 90-0003

HILLSBOROUGH HOLDINGS CORPORATION, at al.,

Plaintiffs,

v.

THE CELOTEX CORPORATION, et al.,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS IS an adversary proceeding commenced in these yet-to-be-confirmed Chapter 11 cases of Hillsborough Holdings Corporation (HHC), now known as Walter Industries, Inc. (Walter Industries), and its 31 wholly-owned subsidiaries (collectively referred to as the Debtors). In this connection, it should be noted that none of the Chapter 11 cases have been substantially

consolidated, although procedurally the Debtors have been treated as a group as the matter involved impacts the interests of all the debtors.

The Debtors in their Complaint named as defendants Celotex Corporation (Celotex), Jim Walter Corporation (JWC), and hundreds of individuals (collectively referred to as Asbestos Claimants) who claim to have suffered personal injuries as the result of exposure to asbestos products manufactured and distributed by Celotex. Celotex was formerly a wholly-owned subsidiary of JWC but did not become part of the group which emerged after the leveraged buy-out (LBO) which ultimately produced HHC, now known as Walter Industries, the primary Debtor in this Chapter 11 case and the lead Plaintiff in this adversary proceeding.

In Count I of the Complaint, the Debtors seek a declaration by this Court that the corporate veil between Celotex and JWC cannot be pierced. In Count 11 of the Complaint, the Debtors seek a declaration that the LBO, a result of which all subsidiaries of JWC, with the exception of Celotex, have been acquired through intermediaries by HHC, now known as Walter Industries, was not a fraudulent transfer. In Count III, the Debtors seek a declaration by this Court that under applicable law, they are not the successors in interest (sic) to the asbestos-related personal injury claims asserted against JWC or Celotex. In Count IV, the Debtors seek a declaration by this Court that under applicable law, they are not liable for the asbestos-related liabilities of either JWC or Celotex.

The immediate matter under consideration is a Motion For Partial Summary Judgment filed by the Debtors. It is the contention of the Debtors that there are no genuine issues of material fact and they are entitled to the relief they seek in Count I of the Complaint, i.e., a declaration that the corporate veil between Celotex and JWC cannot be pierced as a matter of law. The Motion does not involve

the second prong of their attack on the LBO based on the theory of fraudulent transfer.

In order to place the Motion in the proper context and also in the proper procedural posture, a recap of the undisputed facts as they appear from the record should be helpful.

PRE-BANKRUPTCY LITIGATION

In July, 1989, Cimino and Larned, two residents of Texas, filed their respective suits seeking damages for personal injuries based on their claimed exposure to asbestos products allegedly manufactured and distributed by Celotex. The Cimino suit was filed in United States District Court in the Eastern District of Texas, Beaumont, Division. it is styled *Cimino, et al. v. Raymark Industries, et al.*. The Larned suit, styled *Larned, et al. v. Kohlbrg, Kravis, Roberts & Co., et al*, was originally filed in the State Court in Jefferson County, Texas. In due time JWC removed the *Larned* action to the U.S. District Court in the Eastern District of Texas.

Both actions were filed as class actions. However, before either of these suits reached the point of certification of the class, these suits came to halt by virtue of the fact that the Debtors, who were also named as defendants in both suits, filed their respective Petitions for Relief under Chapter 11, on December 27, 1989. This in turn automatically triggered the operation of the automatic stay imposed by § 362 of the Bankruptcy Code and stopped any further proceedings against the Debtors in the two Texas litigations.

In this connection, it should be noted that Celotex, one of the lead Defendants in the two lawsuits, was not a Chapter 11 debtor at the commencement of the Texas suits, or even when the Debtors filed this adversary proceeding. However, it later became a debtor itself when it filed its own Petition for Relief under Chapter 11 of

the Bankruptcy Code on October 12, 1990. Its Chapter 11 case is still pending in this District, albeit not before this Court.

THE COMPLAINT FOR DECLARATORY RELIEF

Shortly after the commencement of the Chapter 11 cases filed by HHC and its subsidiaries, the Debtors filed this adversary proceeding, No. 90-0003. As noted earlier, in this adversary proceeding the Debtors named as Defendants Celotex and JWC, in addition to Cimino and Larned and all others who were the putative members of the classes yet to be certified in the two Texas lawsuits. Even a cursory reading of the Complaint filed by the Debtors in this Court leaves no doubt that it is really nothing more than the flip side of the Texas lawsuits in which Cimino, Larned and the other Asbestos Claimants sought to pierce the corporate veil between Celotex and JWC, and once this is accomplished, to proceed to attack the LBO as a fraudulent transfer in order to be in a position to assert their personal injury claims against the former assets of JWC which were acquired by the Debtors and their subsidiaries through the LBO.

Before discussing the facts relevant to the Motion under consideration, it should be noted that all parties agreed that the right of the Asbestos Claimants to pierce the corporate veil of Celotex is a threshold issue, the resolution of which will without doubt have a profound impact on not only the Chapter 11 cases of the Debtors but also on the fate of Celotex. Accordingly, all parties sought and obtained relief from stay in the Chapter 11 case of Celotex for the limited purpose of litigating the issue of piercing the corporate veil of Celotex.

HISTORICAL DEVELOPMENT OF THE DEBTORS

In 1946, Mr. James W. Walter joined with Mr. Lou Davenport and formed a partnership for the purpose of building and selling shell homes with completed exteriors and unfinished interiors. Mr. Davenport left the business which was then carried on by Jim Walter, initially as a sole proprietor, under the name of Walter Construction Company. In 1955, Jim Walter incorporated the business under the name of Jim Walter Corporation (JWC).

By 1963, JWC had purchased 61% of the outstanding shares of Celotex common stock, and by 1964, JWC had completed its acquisition of Celotex and Celotex became a wholly-owned subsidiary of JWC. JWC also acquired controlling interests in several other corporations, and by 1970 had become a pure holding company for numerous subsidiaries employed in various business activities including coal and marble mining, and the manufacturing of gypsum board, building materials, and cast iron and ductile pipe.

In April of 1972, Celotex acquired a controlling interest in The Panacon Corporation (Panacon) with $62 million advanced by JWC. Shortly thereafter, Celotex and Panacon merged with the unanimous written consent of the Board of Directors of Celotex and Panacon. At the time of the acquisition by Celotex, Panacon had revenues of $181.1 million, not income of $10.6 million and assets of $106 million in 1971, and employed 5500 people.

In 1974, the Federal Trade Commission (FTC) sued JWC for violation of § 7 of the Clayton Act (15 U.S.C. § 18) in connection with Celotex's acquisition of Panacon. The opinion rendered by the FTC was limited to anti-trust matters and determined that the corporate identity of Celotex should be disregarded for the purposes before the FTC. However, *in dicta* the FTC stated that "we do not imply that the separate incorporation of JWC and Celotex should be disregarded for all purposes; that must be determined in light of

the applicable facts and legal principles in each case." The FTC opinion was vacated by the Fifth Circuit Court of Appeals in 1980.

Beginning in the mid-1970's numerous suits were filed against Panacon by parties who claimed to have been injured as the result of alleged exposure to products distributed and sold by Panacon which contained asbestos. After the merger, Celotex was also named as a defendant in numerous law suits filed by asbestos-related personal injury claimants. A great majority of these law suits alleged liability based on pre-1972 activities of Philip Carey Corporation, a predecessor-in-interest of Panacon, which in 1969 merged into the Briggs Manufacturing Company, and which ultimately became the surviving corporation, Panacon.

METHOD OF OPERATION/CASH MANAGEMENT SYSTEMS

JWC established a central cash management system in the 1970's for all of its wholly-owned subsidiaries. Under this system all excess cash generated by the subsidiaries was transferred to the central cash management account maintained by JWC in Tampa. According to the Debtors the system was established in order to maximize the efficient use of the pooled funds of the subsidiaries. The pooled funds were used first, to pay the bills of the subsidiaries and also to provide intercompany loans at rates mare favorable than those which could be obtained by the subsidiary from outside institutional lenders. Celotex collected its own receivables and paid its own payables, albeit with funds transferred from the cash management account of JWC. Celotex maintained a checking account always with a zero balance, but used same with full credit accorded through inter-company receivable and payable accounts. According to the Debtors, the cash management system was nothing more than "a revolving credit/working capital loan agreement between JWC and its subsidiaries." (Matlock Supp. Aff. II @ 5)

Celotex had separate bank accounts that operated through lock box arrangements, and Celotex customers sent their payments to the lock box. At the end of each business day, the funds in Celotex accounts were wire transferred to a JWC account, and Celotex received a credit for the funds transferred. Celotex handed disbursements in a similar manner. Celotex decided which bills it would pay, and when it would pay those bills. The bank with which Celotex had its accounts would notify the treasury department of JWC when a Celotex check was presented to the Bank for collection, and JWC would wire transfer funds from a JWC account to cover all checks that were presented to the Bank on that day. JWC and Celotex, like all other subsidiaries of JWC, made separate debit and credit entries in their books to account for all receipts and disbursements.

Celotex maintained an inter-company payable account and an inter-company receivable account with JWC pursuant to the cash management system. According to the Debtors, the records reflected at all times the balance between Celotex and JWC, including the amount of funds borrowed by Celotex from JWC at any given time, and the amount of funds owed to Celotex by JWC. This accounting system required that all the subsidiaries in Jwc maintain strict and separate accounting records for each transaction. Moreover, even individual divisions of subsidiaries also maintained separate records of inter-company payables and receivables under the central cash management system. According to the Debtors, it was understood that all loans by JWC to the subsidiaries were to be repaid by the subsidiaries with interest even though none of these loans were documented as ordinary loan transactions, i.e., by execution of promissory notes payable on demand or with fixed due dates under fixed finance charges. Whether the transfer of these funds was actually repayment of loans as claimed by the Debtors or instead, was return of capital to JWC, as claimed by the Asbestos

Claimants, is one of the central issues involved in the Motion under consideration. In this connection, it should be noted that the undisputed fact that these finds were immediately credited against the balance owed by Celotex to JWC under the cash management system does not necessarily compel the conclusion urged by the Debtors that this represented the repayment of inter-company loans.

As part of the cash management system, JWC recouped the interest costs it incurred on money it borrowed from third parties and then in turn, loaned to its subsidiaries through a corporate assessment. The corporate assessment was an interest charge designed to recover JWC's cost of borrowing cash which was used by Celotex and other subsidiaries. The corporate assessment also included a charge to reimburse JWC for the cost of centralized and corporate services provided to the subsidiaries by JWC. The corporate assessment rate was set at the beginning of each year. Between 1982 and 1987, Celotex paid to JWC corporate assessments in the amount of $126.3 million. According to the Debtors, the interest rate associated with the corporate assessment rate was well below any interest rate that Celotex and the other subsidiaries could have obtained on the open market.

CORPORATE GOVERNANCE

Each subsidiary had separate corporate minute books and separate accounting records and employees. However, while Celotex hired or fired its lower level employees, decisions concerning senior management required approval by the JWC Board. Each operating company handled all its own promotions, except for those which called for a substantial deviation from established practice. Each Subsidiary had its own payroll, and paychecks were issued on accounts in the subsidiary's corporate name. It should be noted that Celotex had its own Board of Directors which generally acted by written consent and rarely met face-to-face.

The Board of Directors of JWC monitored key events of Celotex and other subsidiaries, and provided oversight functions. The Board of JWC discussed certain issues affecting Celotex, including the acquisition and construction of plants, the closing or sale of plants, the acquisition or transfer of assets and the like. However, the Board of Directors of JWC was not involved in the day-to-day operations of the subsidiaries.

JWC established profit centers which were composed of subsidiaries or divisions of subsidiaries to facilitate efficient reporting. Profit centers were designated as operating groups along certain business lines, or in a manner to reflect common business consideration such as product lines, marketing, distribution, or geographic location. For internal purposes, JWC reported the financial status of subsidiaries and divisions by profit center. However, public financial reports were issued for each subsidiary, not for profit centers.

JWC monitored the performance of subsidiaries through its reporting structure. A JWC officer would serve as a liaison between JWC and the subsidiary for reporting purposes. Each officer was assigned to a number of profit centers and would discuss the financial status and operating reports of the entities in that profit center, after which time the officer would report this data to senior management of JWC. The JWC officers did not perform management functions or act in a decision-making capacity for their respective profit centers.

DIVESTITURE OF ASSETS BY CELOTEX

It is without dispute that between 1981 and 1983, Celotex lost over $70 million due to the severe economic recession which heavily impacted the construction industry. During this time period, the inter-company liability of Celotex reached $291 million. Beginning in 1982, Celotex established a divestiture program and sold 26 of its divisions and subsidiaries to JWC, other JWC subsidiaries and unrelated third parties. These sales produced $165 million which, according to the Debtors, was used by Celotex to reduce its inter-company liability to JWC. According to the Asbestos Claimants, these sales resulted in Celotex's divestiture of approximately half of its assets, although this Court is unable to determine the precise impact of the sales in Celotex's not worth based on this record.

CONTENTIONS OF ASBESTOS CLAIMANTS

The divestiture of assets by Celotex is the heart of the Asbestos claimants claim that the corporate veil of Celotex should be pierced and JWC should be liable for the personal injury claims of the Asbestos Claimants. The central point of this claim is based on the allegations that JWC, the parent, misused and disregarded the separateness of JWC and Celotex and orchestrated the methodical divestiture of valuable assets of Celotex and then funnelled the proceeds of these sales in the guise of repayment loans to JWC which, according to the Asbestos Claimants, were at most a return of capital and not repayment of bona fide loans.

The Asbestos Claimants contend that there are genuine issues of material fact which would prevent the disposition of the controversy in favor of the Debtors as a matter of law. In the alternative, they contend that under the applicable legal principles, the Debtors are not entitled to a judgment as a matter of law, even if the Court finds that there are no genuine issues of material fact.

A close analysis of the undisputed facts of this record, together with the argument of the Asbestos Claimants leaves no doubt that they really do not challenge the historical facts, but that they certainly draw different inferences and conclusions from those facts. The classic scenario under which attempts have been made to pierce the corporate veil involve a closely-hold corporation where creditors of the corporation seek to impose personal liability on the principals of the corporation. *See, e.g., Sampsell v. Imperial Paper & Color Corp.*, 303 U.S. 215, 85 L. Ed. 1293, 61 S. Ct. 904 (1940). However, this is not what is involved in the matter under consideration. What is involved is an attempt to destroy the separate legal existence of an entity which was properly created and functioned as a bona fide corporation which fully complied at all times with all the formalities required by applicable law. Notwithstanding, the Asbestos Claimants contend that the cash management system, the divestiture of assets, and the alleged total domination and control of JWC over the affairs of Celotex may warrant piercing the corporate veil of Celotex, if they are given an opportunity to establish their claims at a full scale evidentiary hearing.

In resolving this matter, it should be noted at the outset that one of the basic principles of American corporate law is the rule that a properly formed corporation is an independent and separate legal entity with a life of its own from not only those who originally formed the corporation, but also from any shareholder, including a corporation who owns shares in another, i.e., parent and wholly-owned subsidiaries. *See, e.g., Cancun Adventure Tours, Inc., v. Underwater Designer Co.*, 862 F.2d 1044, 1047 (4th Cir. 1988). In order to destroy the independence and separateness of the validly-created legal entity, either under the law of Delaware, the place of incorporation of Celotex, or under the laws of this state, it is the claimant's burden to establish 1) that the shareholder

dominates and controls the corporation to such an extent that the corporation has no independent existence; 2) the corporate form must have been used fraudulently or for an improper purpose; and 3) the fraudulent or improper use of the corporate form must have caused the claimant injury. *See In re Rodriguez*, 895 F.2d 725, 796, n.6 (11th Cir. 1990); *Dania Jai-Alai Palace, Inc. v, Sykes*, 450 So. 2d 1114 (Fla. 1984); *Mobil Oil Corp. v. Linear Films Inc.*, 718 F. Supp. 260 (D. Del. 1989).

The principles governing disposition of controversies without trials, Fed. R. Civ, P. 56, has been adopted by Bankruptcy Rule 7056 in toto. Clearly, the principles which govern the application of Fed. R. Civ. P. 56 are equally applicable if motions for summary judgment are filed in a bankruptcy court, either in the context of an adversary proceeding or in a contested matter pursuant to F.B.B.P. 9014.

Based upon this voluminous record one might at first blush conclude that the limited aspect of the adversary proceeding concerning piercing of the corporate veil may be resolved as a matter of law, based on the assumption that through the extensive discovery, one might rightfully conclude that there are indeed no genuine issues of material fact. However, this is not an ordinary veil piercing case and, upon careful consideration of the entire record this court concludes that resolving this precise and narrow issue under consideration as a matter of law would not be proper and fair for the following reasons.

The most crucial aspects of this controversy are (1) the precise manner of the operation of the cash management system, (2) the record-keeping account activities by JWC and its subsidiaries, including Celotex, and (3) most importantly, the extent of the control exercised by JWC over the affairs of Celotex, especially the extent of JWC's involvement in the decision-making process of the

divestiture program of Celotex referred to earlier. Specifically, this Court must determine whether the sales by Celotex of its divisions were done for legitimate business purposes or thether they were done solely for the purpose of denuding Celotex of assets in order to keep those assets out of the reach of the Asbestos Claimants and to funnel the proceeds of these sales to JWC. This, in turn, brings into consideration whether or not the transfer of funds derived from the divestiture of Celotex's assets and those made in connection with the cash management system were, in fact, repayment of bona fide loans, loans which were properly documented, or nothing more than a return of equity to JWC.

Although it appears that some of the material facts are undisputed, the parties dispute the inferences which may be drawn from those facts. As the Eleventh Circuit Court of Appeals has stated, "[i]f reasonable minds might differ on the inferences arising from undisputed facts, then a court should deny judgment." *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Therefore, this Court is satisfied that the Motion For Summary Judgment must be denied. Further, in light of the fact that all these questions involve the mental attitude of the principal players and the subjective motivation of the parties involved, it would be improper to resolve this question without giving the Asbestos Claimants an opportunity to test the truthfulness of the parties on cross examination.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion For Summary Judgment is hereby denied. It is further

ORDERED, ADJUDGED AND DECREED that a continued pretrial conference is scheduled for September 8, 1992 at 1:30 p.m. in Courtroom A, 4921 Memorial Highway, Tampa, Florida.

DONE AND ORDERED at Tampa, Florida, on the 25 day of August, 1992.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge